

SENATE BILL NO. 2393

Introduced by

Senator Lindaas

1 A BILL for an Act to amend and reenact section 28-32-12.1 of the North Dakota Century Code,
2 relating to ex parte communications between an agency head and the agency head's litigation
3 attorney.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Section 28-32-12.1 of the 1997 Supplement to the North
6 Dakota Century Code is amended and reenacted as follows:

7 **28-32-12.1. Ex parte communications.**

- 8 1. Except as provided in ~~subsection~~ subsections 2 and 4 or unless required for the
9 disposition of ex parte matters specifically authorized by another statute, an
10 agency head or hearing officer in an adjudicative proceeding may not
11 communicate, directly or indirectly, regarding any issue in the proceeding, while the
12 proceeding is pending, with any party, with any person who has a direct or indirect
13 interest in the outcome of the proceeding, with any other person allowed to
14 participate in the proceeding, or with any person who presided at a previous stage
15 of the proceeding, without notice and opportunity for all parties to participate in the
16 communication.
- 17 2. When more than one person is the hearing officer in an adjudicative proceeding,
18 those persons may communicate with each other regarding a matter pending
19 before the panel. An agency head or hearing officer may communicate with or
20 receive aid from staff assistants if the assistants do not furnish, augment, diminish,
21 or modify the evidence in the record.
- 22 3. ~~Unless~~ Except as provided in subsection 4 or unless required for the disposition of
23 ex parte matters specifically authorized by statute, no party to an adjudicative
24 proceeding, no person who has a direct or indirect interest in the outcome of the

1 proceeding, no person allowed to participate in the proceeding, and no person who
2 presided at a previous stage in the proceeding may communicate directly or
3 indirectly in connection with any issue in that proceeding, while the proceeding is
4 pending, with any agency head or hearing officer in the proceeding without notice
5 and opportunity for all parties to participate in the communication.

6 4. In an adjudicative proceeding conducted by a hearing officer other than the agency
7 head, counsel for the administrative agency and the agency head, without notice
8 and opportunity for all parties to participate, may communicate and consult
9 regarding the status of the adjudicative proceeding, discovery, settlement, litigation
10 decisions, and other matters commonly communicated between attorney and
11 client, to permit the agency head to make informed decisions. This subsection
12 does not apply after recommended findings of fact, conclusions of law, and orders
13 have been issued, except counsel for the administrative agency and the agency
14 head may communicate regarding settlement and negotiation after recommended
15 findings of fact, conclusions of law, and orders have been issued.

16 5. If, before being assigned, designated, or appointed to preside in an adjudicative
17 proceeding, a person receives an ex parte communication of a type that could not
18 properly be received while presiding, the person, promptly after being assigned,
19 designated, or appointed, shall disclose the communication in the manner
20 prescribed in subsection 5 6.

21 ~~5.~~ 6. An agency head or hearing officer in an adjudicative proceeding who receives an
22 ex parte communication in violation of this section shall place on the record of the
23 pending matter all written communications received, all written responses to the
24 communications, or a memorandum stating the substance of all oral
25 communications received, all responses made, and the identity of each person
26 from whom the person received an ex parte oral communication, and shall advise
27 all parties, interested persons, and other persons allowed to participate that these
28 matters have been placed on the record. Any person desiring to rebut the ex parte
29 communication must be allowed to do so, upon requesting the opportunity for
30 rebuttal. A request for rebuttal must be made within ten days after notice of the
31 communication.

- 1 ~~6.~~ 7. If necessary to eliminate the effect of an ex parte communication received in
2 violation of this section, an agency head or hearing officer in an adjudicative
3 proceeding who receives the communication may be disqualified, upon good cause
4 being shown in writing to the hearing officer or to the agency. The portions of the
5 record pertaining to the communication may be sealed by protective order issued
6 by the agency.
- 7 ~~7.~~ 8. The agency shall, and any party may, report any willful violation of this section to
8 the appropriate authorities for any disciplinary proceedings provided by law. In
9 addition, an administrative agency may, by rule, provide for appropriate sanctions,
10 including default, for any violations of this section.
- 11 ~~8.~~ 9. Nothing in this section prohibits a member of the general public, not acting on
12 behalf or at the request of any party, from communicating with an agency in cases
13 of general interest. The agency shall disclose such written communications in
14 adjudicative proceedings.